New Zealand Law Society
Te Kāhui Ture o Aotearoa

COVID-19 Response (Courts Safety) Legislation Bill

17/03/2022

COVID-19 Response (Courts Safety) Legislation Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the COVID-19 Response (Courts Safety) Legislation Bill (**Bill**).

1.2 The Law Society supports the purpose of this Bill, which seeks to ensure people can safely access justice through courts and tribunals during the COVID-19 outbreak. This submission makes recommendations to improve the Bill and to limit encroachment on open justice.

1.3 This submission has been prepared with input from the Law Society's Criminal Law Committee, Civil Litigation and Tribunals Committee, and Public and Administrative Law Committee.[1]

1.4 The Law Society does not wish to be heard, however is available to assist with any questions the Select Committee may have.

2 Amendments to the Juries Act 1981 (Schedule 3)

2.1 Schedule 3 of the Bill provides for temporary amendments to the Juries Act 1981 and to the Jury Rules 1990,[2] which provide the overarching statutory framework for the selection and management of juries.

Powers of heads of bench to make secondary legislation

2.2 Schedule 3 of the Bill inserts a new Schedule 2 into the Juries Act 1981. Clause 4 of this proposed new Schedule provides that the heads of bench may make protocols setting out various requirements relating to jurors and jury services (clause 4(2)(b)) and these protocols are secondary legislation (clause 4(4)). The protocols may "be in addition to and apply despite," certain provisions in the Juries Act and the jury rules.[3] Although the protocols are deemed to be secondary legislation, the effect of the Bill is that the protocols made by the judiciary may nonetheless amend primary legislation.

2.3 This proposal raises issues about the separation of powers and the relationship between the three branches of government. Traditionally, Parliament makes the law, the Executive implements or administers the law, and the judiciary interprets and applies the law. Parliament also delegates its law-making powers on matters of implementation and detail to the Executive (to make secondary legislation). However, Parliament retains its oversight of Executive law-making through the Regulations Review Committee and by disallowance of secondary legislation.

2.4 There is a risk this current proposal may bring the different branches of government into conflict and create an imbalance in their relationship. As secondary legislation, the protocols

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1 Information regarding these committees can be found on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2 The Jury Rules 1990 have been made under section 35 of the Juries Act. They are secondary legislation made by the Governor-General by Order in Council, on the advice of the Minister of the Crown responsible for the Ministry of Justice, after consultation with the Chief Justice, Chief District Court Judge and the President of the Law Society (or their nominees).

3 Clause 4(2)(a).

made by the judiciary would need to be submitted to the appropriate Minister for presentation in Parliament, and then subject to scrutiny by the Regulations Review Committee.[4] The protocols could also be disallowed by Parliament.[5] While Parliament is sovereign and there is clear need for oversight and transparency (particularly as the protocols could amend the requirements of primary legislation), we query whether the judicial branch of government should be subject to this process.

2.5 At the heart of the issue is that the proposal raises a question as to whether it is appropriate for the Bill to establish the judiciary as law-makers, rather than their current role in relation to the law.[6] In its current form, the Bill would impact the ability of the judiciary to determine any legal challenges to the protocols, which, as secondary legislation, are also subject to judicial review and oversight. If an individual wished to judicially review a protocol, the court would be required to adjudicate a matter in which it was the maker of the rule that is subject to challenge. This could raise concerns regarding the independence of the judiciary and cause the public to lose confidence in its role as a neutral arbiter of disputes.

2.6 We understand there is a need for flexibility to alter the requirements for selecting and managing juror due to the risks of COVID-19. In the Law Society's view, these needs could be better addressed by adopting an alternative approach which does not require the judiciary to step into a law-making role:

(a) The Bill could provide that the protocols are regulations made by the Governor-General, with the concurrence of the Chief Justice, Chief District Court Judge and 2 members of the Rules Committee. This would result in the protocols being drafted by the Parliamentary Counsel Office (**PCO**). We accept that this may cause some delay, but this would be justified on the basis that any secondary legislation that amends primary legislation should be drafted by the PCO. The regulations would also have to be approved by Cabinet, which would add to the timeframe, but there may be grounds for waiving the 28 days' notice requirement.

(b) Alternatively, the protocols could be made according to a framework similar to that provided in section 35(2) of the Juries Act, but without the involvement of the Governor-General. These protocols could be made by the Minister of Justice, after consultation with the Chief Justice, Chief District Court Judge and the President of the Law Society (or their nominees). It is not unusual for Ministers to make secondary legislation in this way,[7] and New Zealand Bill of Rights Act 1990

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4 Section 114 of the Legislation Act 2019.

5 Section 115 of the Legislation Act 2019.

6 We note that the High Court Rules made under the Senior Courts Act 2016 are deemed part of that Act (section 147) and are published as secondary legislation. Previously, the High Court Rules were a schedule to the Judicature Act 1908. Other rules for senior courts are regulations (made by the Governor-General with the concurrence of the Chief Justice and the Rules Committee). Similarly, District Court Rules are also regulations made by the Governor-General with the concurrence of the Chief District Court Judge and members of the Rules Committee. Current rules of court (senior courts rules and District Court Rules) are made under the authority of legislation with input from the judiciary and the Rules Committee and published as secondary legislation However, they are not made directly by the judiciary.

7 For example, there are extensive rule-making provisions in the Civil Aviation Act 1990, Land Transport Act 1998 and the Maritime Transport Act 1994. The COVID-19 Public Health Response Act 2020 also

considerations can be incorporated into the provision empowering the Minister to make the protocols.

(c) If, however, there are concerns about the flexibility or agility of a process involving the Minister or the Governor-General, the Chief Executive of the Ministry of Justice could perhaps have the power to make temporary protocols which, for example, automatically expire within 28 days unless confirmed by the Minister.[8]

2.7 These options would, in our view, better preserve the separation of powers by ensuring the function of rule-making is only delegated to those bodies that have a constitutional role as law-makers.

Deferrals of, or excusals from, jury service

2.8 Clauses 9 and 10 of proposed new Schedule 2 seek to give the Registrar powers to, of their own initiative, defer or excuse jury service. Both clauses provide that no application is required or permitted.[9] These clauses would therefore require the Registrar to simply notify a juror that their attendance is deferred or excused.

2.9 It is not clear why the Bill prohibits applications, an approach that differs from sections 14B and 15 of the Juries Act,[10] under which jury service is ordinarily deferred or excused. It may have been assumed that a Registrar will be well placed to identify when an individual does not meet the COVID-19 jury requirements, in which case an application will not be required. Alternatively, it may be intended that clauses 9 and 10 are to be used by the Registrar where an individual refuses to participate, confirm vaccination status, or be tested for COVID-19. While this may mean there is practical merit in not *requiring* an application, prohibiting application seems unnecessary and could prove impractical in future.

2.10 For example, if an individual was to advise the Registrar that they do not meet (or no longer meet) the COVID-19 jury requirements, the Registrar would be unable to treat that as an 'application' to be excused but would nonetheless have to consider whether to excuse the individual, in order to maintain the safe operation of the Courts. The prohibition on making an application becomes somewhat irrelevant.

2.11 It may have been anticipated that in such cases, an individual would make an application under either clause 11 or 13. However, as currently drafted, those titles to those clauses refer to deferral or excusal on '*other* specific COVID-19 related grounds', differentiated from clauses 9 and 10, which apply where a person does not meet the COVID-19 jury requirements. In the example provided above, the reason for excusal would in fact be the latter.

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has provision for the Minister for COVID-19 Response to make significant orders under that legislation, with a requirement to have regard to health advice and the rights and freedoms in the New Zealand Bill of Rights Act 1990.

8 This approach is also supported by the fact that court staff are employed by the Ministry of Justice (and not by the judiciary) and any health and safety obligations therefore sit with the Ministry.

9 Clauses 9(4) and 10(2).

10 It also differs from clauses 11 and 13 of the Bill, which allow an application to be made.

3 Permanency of some amendments

3.1 The Law Society acknowledges that some of the amendments proposed by the Bill seek to resolve issues that existed prior to, but were exacerbated by, the COVID-19 pandemic. This includes:

(a) Clause 1, proposed schedule 1AB to the Criminal Procedure Act 2011 (CPA) – a hearing may be conducted by audio-visual link or audio link.

(b) Clause 2, proposed schedule 1AB to the CPA – powers relating to the right of public to enter and remain in areas of the court.

(c) Clause 2, proposed schedule 2 to the Juries Act – confirming that nothing in the Act limits the inherent or implied powers of the heads of bench or a presiding judge.

(d) Clause 22, proposed schedule 2 to the Juries Act – removing from section 18 reference to jury selection taking place 'in the precincts of the court'.

3.2 As this Bill has proceeded with a truncated consultation period, the Law Society agrees it is appropriate for these changes to remain temporary. While this Bill will mean that permanent change is not immediately necessary, the Law Society suggests that now is an opportune time for officials to begin considering permanent changes to this effect. Any permanent amendments should then be subject to full public scrutiny and debate, including through a standard Select Committee process.

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